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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

GUINNANE CONSTRUCTION CO., INC., Plaintiff and Respondent, v. STEPHEN MARC CHESS, et al., Defendants and Appellants.	A157781 (Alameda County Super. Ct. No. RG18932289)

Defendants and appellants Chess Connect, Inc., and Stephen Marc Chess (collectively, Chess) appeal an order denying their anti-SLAPP motion seeking to strike the complaint of plaintiff and respondent Guinnane Construction Co., Inc. (Guinnane). The complaint alleges causes of action for inducing breach of contract, intentional interference with contractual relations, and intentional and negligent interference with prospective economic advantage.

Guinnane cross-appeals arguing the trial court erred in denying its request for attorney fees.

We affirm the trial court's rulings denying both Chess's anti-SLAPP motion and Guinnane's motion for attorney fees.

BACKGROUND

The case arises out of a real estate transaction involving an eighty-acre parcel of land in Livermore, California (the Property). At the time of the transaction, non-party DeLima Trust (the Trust), the family trust of Clifford and Barbara DeLima, owned a fifty percent interest in the Property, and non-parties Petersons and Hibners (Peterson/Hibners) owned the other fifty percent interest.

In 2016, Edmund Jin contacted Chess about purchasing the Property, saying he was interested in it as a ranch on which he could set up a polo field. He wanted to purchase the entire property. Chess contacted Russ Peterson and Clifford DeLima and learned that the DeLimas had their primary residence on the Property and did not want to sell their interest. Chess and Jin changed plans and contemplated purchasing the Peterson/Hibners' interest in the Property and then seeking a partition to force the DeLimas to sell their interest. Chess and Jin had made an offer to purchase the whole property for $3 million but, after it became clear the DeLimas would not sell the Trust's interest, offered to purchase the Peterson/Hibners' interest for $1.2 million as the first step in the plan to acquire the entire property.

Chess was aware there was a tenants-in-common (TIC) agreement under which the Trust and the Peterson/Hibners each had a right of first refusal to acquire the other's interest in the Property if the other party attempted to sell their interest to a third party. He had been told by the Peterson/Hibners' attorney that the agreement had expired. But he wasn't sure that was correct, and added language to Jin's offer to provide that the "Buyer Due Diligence Period shall not commence until the 30 day Right of First Refusal from the DeLima Trust waives its purchase option." He knew when he added this language that the Peterson/Hibners were going to extend

the right of first refusal to the DeLima Trust. Indeed, he had insisted that the Peterson/Hibners do so.

On April 4, 2017, the Peterson/Hibners sent the DeLimas a letter offering the Trust the right to purchase the property for the same purchase price Jin had offered. On April 11, 2017, the DeLimas, as Trustees, exercised its right of first refusal. On April 21, 2017, they assigned the Trust's right to purchase the Peterson/Hibners' property to Guinnane. The Peterson/Hibners told Chess the Trust had exercised its right of first refusal to purchase the Peterson/Hibners' interest in the Property for $1.2 million, and that they would not proceed with the sale of their interest to Jin.

However, the Petersons/Hibners failed to complete the sale of the Property to Guinnane. Guinnane called Russ Peterson two days before escrow was supposed to close (May 1, 2017) to request certain information the title company needed. Peterson promised he would send the information but then stopped returning Guinnane's phone calls and failed to consummate the sale. On May 8, 2017, apparently at Chess's request, Peterson wrote to the DeLimas falsely stating the Peterson/Hibners had decided not to sell their interest in the Property "at this time."

In the meanwhile, Jin and Chess were not deterred by the Trust's exercise of its right of first refusal. Instead, they decided to "up [their] offer" and engage in a "negotiation" or "bidding war." Chess's goal was "to tie up the property" by getting in contract with the Peterson/Hibners, "forc[ing] the sale" of their interest in the Property to Jin and "get[ting] rid of" the DeLimas "completely through a process called a partition sale." On April 28, 2017, Chess texted Peterson that "[m]y client is now at 1,500,000." On May 4, he texted, "We will also indemnify you from future possible Cliff [DeLima] issues." On May 17, 2017, the Peterson/Hibners' attorney told Chess that

any agreement they reached would have to include a hold harmless and indemnification provision for the benefit of his clients. On May 24, 2017, Chess texted Peterson that he would "eliminate my commission therefore you will . . . clear a true $150,000 extra each." The Peterson/Hibners ultimately agreed to sell the property to a relative of Jin for $1.5 million, and Jin provided the sellers an indemnity and joint defense agreement.

On May 22, 2017, Guinnane filed suit against the Peterson/Hibners seeking specific performance in Alameda County Superior Court. The specific performance complaint alleged that the DeLima Trust had a right of first refusal to purchase the Peterson/Hibners' interest under the TIC agreement, that pursuant to that right the Peterson/Hibners offered the DeLima Trust the right to purchase their interest for $1.2 million, that the Trust timely accepted that offer thus creating a contract obligating the Peterson/Hibners to sell the Property to the Trust, that the Trust assigned its contractual right to purchase the property to Guinnane, and that the Peterson/Hibners failed and refused to perform and honor the agreement by selling the property to Guinnane. The complaint sought, in the alternative, specific performance of the TIC agreement or specific performance of the purchase and sale agreement.

On July 14, 2017, while the specific performance suit was pending, the Peterson/Hibners sold their fifty percent interest in the Property to Jin's brother-in-law for $1.5 million.

The specific performance suit was tried in a bench trial before Alameda County Superior Court Judge Ronni B. MacLaren. Following the bench trial, the court held that Guinnane was entitled to specific performance and ordered the Property be transferred to Guinnane. The court issued a 12-page order setting forth its findings and conclusions. It described the "principal

issue in dispute in this case" as whether the Peterson/Hibners and the DeLima Trust "entered into a valid contract for the purchase of the" Peterson/Hibners' interests in the Property. Also in dispute, the order stated, was "whether the contract, if formed, satisfies the statute of frauds, is supported by adequate consideration, and contains terms sufficiently definite to be enforced."

The trial court entered judgment in favor of Guinnane in August 2018, and the Peterson/Hibners transferred the property to Guinnane in September 2018.

On December 14, 2018, Guinnane filed the lawsuit that is the subject of this appeal. Guinnane alleged that Chess and Jin deliberately interfered with Guinnane's existing contract with the Peterson/Hibners through statements and conduct used to induce the Peterson/Hibners to renege on the contract and sell to Jin instead. In response, Chess filed a special motion to strike the complaint under the anti-SLAPP statute, section 425.16. Chess contended that his speech constituted prelitigation statements, and thus, was protected activity pursuant to section 425.16, subdivision (e)(1), and that Guinnane could not prevail on its claims against him.

In May 2019, the Honorable Paul D. Herbert of the Alameda Superior Court denied the motion on the ground that the statements made by Chess were not made in connection with the specific performance lawsuit. Because the court found Chess had not met its burden to establish that the complaint alleged protected activity, it did not analyze the probability that Guinnane would prevail on its claims in this action. The court also denied Guinnane's request for attorney fees because it did not find Chess's motion to be frivolous.

DISCUSSION

I.

Chess's Appeal

A. Anti-SLAPP Law and the Standard of Review

In response to courts being flooded with meritless lawsuits designed to stifle free speech and petition rights, the Legislature adopted the anti-SLAPP statute, Code of Civil Procedure section 425.16.[1] (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783.) "The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.)

The anti-SLAPP statute provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has establishes that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) Section 425.16, subdivision (e) defines acts in furtherance of the rights of petition and free speech to mean, "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of

[1] All further statutory references are to the Code of Civil Procedure.

public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (*Haneline Pacific Properties, LLC* (2008) 167 Cal.App.4th 311, 317-318 (*Haneline*).)

"In ruling on an anti-SLAPP motion, the trial court engages in a two-step process. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on that claim.' " (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1060, quoting *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) " 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Haneline*, *supra,* 167 Cal.App.4th at p. 318, quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).)

"[T]hat a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such." (*Navellier*, *supra,* 29 Cal.4th at p. 89.) Thus, "[i]n deciding whether the initial 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts [on] which the liability or defense is based.' " (*Ibid.*)

We review de novo a trial court's ruling granting or denying an anti-SLAPP motion. (*Richmond v. Compassionate Care Collective v. 7 Stars Holistic Foundation, Inc.* (2019) 32 Cal.App.5th 458, 466-467.) Like the trial court, "we consider 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' [Citation.] However, we do not weigh credibility or compare the weight of the evidence. [Citation.] Rather, we accept as true evidence favorable to the plaintiff, determine whether the plaintiff has made a prima facie showing of facts necessary to establish its claim at trial, and evaluate the defendant's evidence only to determine whether it defeats that submitted by the plaintiff as a matter of law." (*Tichinin v. City of Morgan Hill*, *supra,* 177 Cal.App.4th at p. 1061.)

B. Prong 1 of the Anti-SLAPP Analysis: Do Claims Arise from Protected Activity?

To prevail on an anti-SLAPP motion, a defendant must demonstrate that the " 'conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) [of section 425.16]' [citation], and that the plaintiff's claims in fact *arise* from that conduct." (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 620.) " 'A claim arises from protected activity when that activity underlies or forms the basis for the claim.' (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062 (*Park*).) 'Critically, "the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." [Citations.] . . . [T]he focus is on determining what "the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." ' (*Id.* at pp. 1062-1063.) 'If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech

or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute.' " (*Area 51 Productions, Inc. v. City of Alameda* (2018) 20 Cal.App.5th 581, 594 (*Area 51*).)

The core injury-producing conduct alleged in Guinnane's complaint against Chess and Jin, the parties agree, consists of escalating offers by Chess and Jin as part of their effort to purchase the Peterson/Hibners' interest in the Property after the Trust had exercised the right of first refusal, the Trust having thereby agreed to purchase the property, and assigned its purchase contract to Guinnane. Chess described these offers as a "negotiation" or "bidding war" through which he sought to acquire the Peterson/Hibners' interest in the Property for Jin. The question is whether the offers constitute protected speech or petitioning activity under the anti-SLAPP statute.

Chess contends the offers fall within subdivision (e)(1) of section 425.16 as statements made during judicial proceedings. This subdivision applies to "statements made before a legislative, executive, or judicial proceeding or any other official proceeding authorized by law" (§ 425.16, subd. (e)(1)) and was designed to "further[] the effective exercise of the petition right[]." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118 (*Briggs*); see also *id.* at p. 1121 ["[T]he legislature's intent consistently has been to protect all direct petitioning of governmental bodies . . . with petition-related statements and writings"].) Specifically, Chess contends the offers were protected petitioning activity because they were made to the Peterson/Hibners shortly before or after Guinnane filed suit against the

Peterson/Hibners for specific performance. Chess argues the offers constituted statements before or during those judicial proceedings.[2]

Guinnane acknowledges that "Chess's offers to increase the purchase price for the Property and waive its commission were part of the sequence of events that led to the specific performance action" and that "[i]ndeed, that action would have been unnecessary had those offers been rescinded by Jin or Chess or rejected by the Petersons and Hibner." But as Guinnane points out, there is a "distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity." (*Park, supra,* 2 Cal.5th at p. 1064.)

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[2] Chess makes passing reference to the second provision that protects the right to petition, subdivision (e)(2), in his opening brief. Without even citing the provision, he argues, "Chess's presentation of Jin's higher offer was most certainly 'in connection with an issue under consideration or review' in the specific performance lawsuit." His conclusory attempt to invoke this subdivision, without a separate heading or any significant argument or authority, does not suffice to raise the issue. (See *Hernandez v. Vitamin Shoppe Industries, Inc*. (2009) 174 Cal.App.4th 1441, 1453; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶ 9:21 ["The appellate has discretion to *disregard* issues not properly addressed in the briefs, effectively treating them as having been abandoned"].) Even if we considered the issue, we would find it without merit. Contrary to Chess's position, the specific performance action addressed only the Peterson/Hibners' contractual obligation *to the Trust and Guinnane*, not the validity or enforceability of their contract with *Jin*. That evidence pertaining to Jin's offer was a part of the record did not make those offers or the Jin contract "an issue under consideration or review by a . . . judicial body." "Only communications made in connection with [the validity of the contract between the Peterson/Hibners and DeLima/Guinnane]—what the [court] actually considered—constitute 'written or oral statement[s] or writing[s] made in connection with an issue under consideration or review' by [the court]." (*Rand Resources, supra,* 6 Cal.5th at p. 623.)

Guinnane's point is well taken. Mere temporal proximity between statements and litigation is not enough to demonstrate that the statements constitute protected speech or petitioning activity. The fact that Chess and Jin's inducements to the Peterson/Hibners to breach their contract led Guinnane to file the specific performance action against the Peterson/Hibners does not mean Guinnane's current suit against Chess arose from protected petitioning activity. As we recently stated, " 'Essentially, the "court must 'distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity. . . . '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' " [Citations.] The most recent guidance provided by our Supreme Court is that, in teasing out whether we are dealing with protected conduct under section 425.16, subdivision (b), "courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Park*, *supra*, 2 Cal.5th at p. 1063.)' (*Area 51*, *supra*, 20 Cal.App.5th at pp. 594-595.)" (*Oakland Bulk and Oversized Terminal, LLC v. City of Oakland* (2020) 54 Cal.App.5th 738, 753 (*OBOT*).)[3]

As we will discuss further in the paragraphs that follow, focusing on the elements of Guinnane's claims and the conduct it relies on in support of them (See *OBOT*, *supra*, 54 Cal.App.5th at p. 753), we conclude Chess's " ' "activity . . . that gives rise to his . . . asserted liability" ' "—namely his series of offers to the Peterson/Hibners—is not " ' "protected speech or petitioning." ' " (*Area 51*, *supra*, 20 Cal.App.5th at p. 594.)

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[3] Our high court reiterated this approach in *Rand Resources LLC v. City of Carson*, *supra*, 6 Cal.5th at p. 621.

The causes of action Guinnane has asserted against Chess in this case are inducing breach of contract, intentional interference with contractual relations, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage. Briefly summarized, the elements of these basically similar claims are (a) a valid contract or economic relationship between the plaintiff and a third party; (b) the defendant's knowledge of the contract or relationship; (c) acts by the defendant designed or intended, or reasonably certain, to interfere with the contract or disrupt the relationship; (d) actual breach or disruption of the contract or relationship; and (e) damage proximately caused by such breach or disruption. (See 5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, §§ 843, 855, 867 (2020); see also BAJI 7.80, 7.81, 7.82, 7.82.1.)

The conduct Guinnane alleges in support of these claims, as we have indicated, consists of Chess's efforts to induce the Peterson/Hibners to sell their property interest to Jin rather than honoring the right of first refusal exercised by the Trust and thereafter assigned by the Trust to Guinnane. Specifically, Guinnane alleges that the Trust exercised its right to purchase the Peterson/Hibners' interest in the Property and assigned its right to purchase to Guinnane; that Chess and Jin were aware of the resulting contract between the Peterson/Hibners and Guinnane; that Chess and Jin nonetheless offered the Peterson/Hibners $1.6 million if they would break their contract with Guinnane and sell to Jin instead; and that as further inducements, Chess and Jin offered to waive Chess's broker's fee and to indemnify the Peterson/Hibners for any liability they might incur as a result of failing to sell to Guinnane and pay for the defense in any related action against them. Guinnane alleges that this conduct induced the Peterson/Hibners to breach their contract with Guinnane, causing Guinnane

to incur fees and expenses to litigate the specific performance action and delaying its acquisition of the Property by almost a year and a half.

Contrary to Chess's arguments, the fact that Chess and Jin anticipated their acts might precipitate litigation does not demonstrate their offers to the Peterson/Hibners were communications preparatory to or in anticipation of litigation within subdivision (e)(1) of the anti-SLAPP statute. The offers of increased monetary and other consideration to purchase the property were not initial steps pertaining to potential litigation, such as sending a demand letter, providing legal advice to prospective litigants or undertaking an investigation of circumstances relevant to potential litigation. (Compare *Briggs, supra,* 19 Cal.4th at pp. 1109-1110 [statements and acts counseling and assisting tenants to file administrative complaints and litigation]; *Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1299-1300 [demand letter]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at pp. 780, 783-784 [communications with potential witnesses and victims of alleged fraud in anticipation of seeking investigation by Attorney General]; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1286-1287 [communications with government in course of investigating alleged fraud and other wrongdoing].) Nor were the offers made in response to or defense against the specific performance action. (See *Beach v. Harco National Ins. Co.* (2003) 110 Cal.App.4th 82, 93-94 [defendant responding to an action exercises constitutional right to petition]; *Seltzer v Barnes* (2010) 182 Cal.App.4th 953, 964 [defense counsel's communications as part of settlement negotiation were protected activity].) Rather, they were simply an effort on Chess's and Jin's part to effectuate a business transaction, nothing more and nothing less. In essence, Chess's argument conflates an underlying tort or wrongdoing that may *provoke* a lawsuit with petitioning activity related to that lawsuit.

Kajima Engineering & Construction, Inc. v. City of Los Angeles (2002) 95 Cal.App.4th 921 is instructive. After Kajima sued the City of Los Angeles for nonpayment on a construction contract, the city filed a cross-complaint against Kajima asserting breach of contract, breach of the covenant of good faith and other causes of action. (*Id*. at pp. 923-924.) Kajima moved to strike the cross-complaint, contending it was filed in retaliation for Kajima's complaint against the city, which was an exercise of Kajima's right to petition. (*Id*. at p. 925.) Presiding Justice Perluss, writing for Division Seven of the Second District, rejected Kajima's argument, holding it failed to show the cross-complaint alleged acts in furtherance of its right of petition or free speech. (*Id*. at p. 929.) The city's claims against Kajima were not based on its having filed suit against the city. Rather, the cross-complaint "allege[d] causes of action arising from Kajima's bidding and contracting practices, not from acts in furtherance of its right of petition or free speech." (*Ibid*.)

This case is similar. Guinnane has sued Chess and Jin because they made offers to purchase the Peterson/Hibners' interest knowing the latter were already in contract to sell that interest to Guinnane. Chess's conduct in bidding up the purchase price was no more an exercise of the right to petition the government than Kajima's alleged bidding on the construction project or submitting inflated payment requests and change orders. Just as the Second District found "Kajima was not exercising its right of petition at the time of the alleged acts [but] seeking to secure and working on a construction project," so Chess was not exercising his or Jin's right of petition at the time he made the alleged offers but, rather, was seeking to purchase an interest in real property.

Also helpful is *Haneline*, *supra*, 167 Cal.App.4th 311. Haneline was the lessee of land owned jointly by Carl May and a trust. The trust agreed to sell

its share of the land to Haneline for $500,000, but May persuaded the trust not to proceed with the sale, arguing that if he and the trust terminated Haneline's below-market lease they could obtain a much higher price for the property. Ultimately, May's efforts caused Haneline to sue the trustee for breach of contract and, in settling that suit, to pay much more for the trust's interest in the property than its agreement with the trust had required. Haneline then sued May for interference with contract and prospective economic advantage. (*Id*. at pp. 314-316.)

May moved to strike the complaint under the anti-SLAPP statute, contending his negotiations with the trust about terminating the lease and securing a higher price for the property constituted prelitigation communications. (*Haneline*, *supra*, 167 Cal.App.4th at pp. 316, 317-320.) The trial court agreed, but the Court of Appeal reversed. (*Id*. at pp. 320-321.) Although the defendant contended that " '[t]he spectre of litigation "loomed" over the entire course of the parties' communications,' " the court observed that "the same could be said of nearly any high-stakes negotiation." (*Id*. at p. 320.) It concluded, "Negotiations and persuasion are part of any business deal. To suggest that nearly *any* attempt at negotiation is covered by the privilege, especially when attorneys are involved, is unduly overbroad." (*Ibid*.)

Chess argues *Haneline* is distinguishable because here "there was more than a spectre of litigation during the negotiations. [Guinnane] actually filed its lawsuit before the Petersons/Hibners signed the agreement to sell their interest to Jin." That is true enough, but Chess assumes, without analysis, that the fact that a lawsuit was filed while he and Jin were still negotiating the transaction that induced the Peterson/Hibners' breach converted those negotiations into prelitigation speech or petitioning activity. The *Haneline*

court's conclusion that the gravamen of Haneline's interference with contract and prospective economic relations claims was not protected speech or petitioning activity was based on the nature of the defendant's activities and the court's finding that "the tone and the language were intended to encourage collaboration and agreement, not 'serious consideration' of litigation." (*Haneline*, *supra*, 167 Cal.App.4th at p. 320.) When we likewise focus on Chess and Jin's communications with the Peterson/Hibners, it is undeniable that they were simply negotiations concerning the purchase and sale of Property. Like May and the trust in *Haneline*, Chess and Jin were focused on reaching agreement, not preparing for, instigating or attempting to resolve litigation.

In short, *Kajima* and *Haneline* support the conclusion that the anti-SLAPP statute does not apply to Chess's acts in negotiating with the Peterson/Hibners to secure the purchase of an interest in the Property.

Chess leans into the fact that one of the offers he made on behalf of Jin was to defend and indemnify the Peterson/Hibners against suit by the DeLima Trust and Guinnane, pointing out that the indemnity agreement Jin ultimately signed "expressly referred to the specific performance lawsuit." Again, those assertions are true enough, but they do not convert the offers collectively or even that particular offer into prelitigation conduct. It is undisputed that the Peterson/Hibners demanded the indemnity agreement "[a]s a condition to entering into" the purchase and sale agreement. As with the offers to pay more ($1,500,000) and to waive the seller's commission, the offer to indemnify the sellers was not an exercise by Chess or Jin of petitioning activity, although it apparently ultimately led to Jin engaging in

such activity.[4] Rather, Chess and Jin promised to defend and indemnify the Peterson/Hibners as an inducement to encourage them to sell their interest in the Property to Jin. In other words, their offer was part of the negotiation of a real estate transaction and not protected speech.

As the trial court aptly stated in denying Chess's anti-SLAPP motion, Chess' s offers "are part of non-litigation negotiations for the purchase of real property. The main tie to the specific performance litigation, upon which Chess relies heavily, is the indemnification clause which Chess' client eventually included in the discussions in order to make the offer more attractive to the sellers. Chess' client's agreement to indemnify lowered the sellers' risk and therefore acted as an inducement to come to an agreement. . . . Simply offering an indemnification clause, something common to a wide variety of contracts and contract negotiations, is not an offer to settle a lawsuit, and is not, in itself, enough to turn a standard contract negotiation into a discussion of pending litigation." We could not have said it better.[5]

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[4] According to the complaint, Jin's lawyers defended the Peterson/Hibners in the specific performance lawsuit, and Jin was involved in what Guinnane characterizes as "unnecessarily costly and burdensome litigation strategy" in the case.

[5] Having concluded that the conduct underlying Guinnane's causes of action is not activity protected by the anti-SLAPP statute and that the statutory procedure does not apply, Guinnane was not required to show a probability of prevailing on its claims. Therefore, we need not reach that second prong of the anti-SLAPP analysis. Nor need we address Guinnane's argument that the anti-SLAPP statute does not protect funding of litigation, both because we have concluded that Guinnane's interference claims are not based on Jin having funded the specific performance litigation and further because there is no indication that Chess funded any part of the defense.

II.

Guinnane's Cross-Appeal

In its cross-appeal, Guinnane asks us to reverse the trial court's denial of its motion for attorney fees and to remand for a determination of the amount of fees it incurred in defending against the anti-SLAPP motion in the trial court and on appeal. Guinnane acknowledges the high burdens it faces to show, first, that Chess's anti-SLAPP motion was frivolous, and second, that the trial court abused its discretion in concluding otherwise. Undaunted, it argues that there is no case law supporting Chess's claim that increasing an offer to purchase property by raising the price or offering to waive the broker's commission constitutes protected activity, and that there are numerous cases "reject[ing] attempts to apply the anti-SLAPP statute to private business negotiations." Guinnane also argues that even if the indemnity agreement constituted protected activity, "the case law is clear that such offers and agreements constitute a non-communicative course of conduct that is not covered by the litigation privilege," and that Chess was not a party to the specific performance action. For these reasons, Guinnane argues, Chess's reliance on the litigation privilege for its prong 2 showing "was doomed."

Chess responds by doubling down on his anti-SLAPP arguments, including his prong two argument that Guinnane cannot show a likelihood of prevailing because Chess's offers were protected by the litigation privilege as "speech in anticipation of and during the specific-performance lawsuit."

Section 425.16, subdivision (c)(1) provides in relevant part, "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." "The

'reference to section 128.5 in section 425.16, subdivision (c) means a court must use the procedures and apply the substantive standards of section 128.5 in deciding whether to award attorney fees [to a prevailing plaintiff] under the anti-SLAPP statute.' " (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199.) "A determination of frivolousness requires a finding the anti-SLAPP 'motion is "totally and completely without merit" (§ 128.5, subd. (b)(2)), that is, "*any reasonable attorney would agree such motion is totally devoid of merit.*" ' " (*Ibid*.)

We are sympathetic to Guinnane's argument that Chess's anti-SLAPP motion is baseless. "Case law is abundantly clear that for section 425.16 to apply, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.' " (*Workman v. Colichman* (2019) 33 Cal.App.5th 1039, 1056.) Moreover, the specific application of that rule in *Kajima* and *Haneline*, both recognizing that claims based on business-related communications generally do not arise out of protected activity, is neither novel nor obscure.[6] If that were all that were at issue we might be inclined to reverse the denial of fees.

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[6] See, e.g., *OBOT*, *supra*, 54 Cal.App.5th at p. 758 (city's false promises in connection with agreements to lease and develop property and refusal to issue estoppel certificates and turn over right of way necessary under those agreements); *Workman v. Colichman*, *supra,* 33 Cal.App.5th at pp. 1043-1044, 1048-1053 (neighbor's false statements that he would add second story to block seller's view); *Graffiti Protective Coatings*, *Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1218 (City's conduct in entering contract without competitive bidding); *Garretson v. Post* (2008) 156 Cal.App.4th 1508, 1523-1524 (allegedly wrongful nonjudicial foreclosure); *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 808 (developer's activities pursuing permits); *Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 676-677 (allegedly fraudulent bid at sheriff's auction); *Gallimore v. State Farm Fire & Cas. Ins. Co.* (2002) 102 Cal.App.4th 1388, 1399 (insurer's claims handling conduct); *People ex rel. 20th Century Ins. Co. v. Building*

But there are two reasons we are not prepared to do so. First, as Guinnane acknowledges, the question is not whether we would have reached the same conclusion as the trial court under section 128.5 but whether the trial court abused its discretion in declining to award fees. (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450.) Second, as we have stated, a motion is "totally and completely without merit" for purposes of a finding of frivolousness under section 425.16 subdivision (c)(1) and section 128.5 only if " ' "any reasonable attorney would agree such motion is totally devoid of merit." ' " (*Moore v. Shaw, supra,* 116 Cal.App.4th at p. 199, italics omitted.) In short, the motion must lack *any* arguable merit.

While there is not even arguable merit to Chess's claims that the offers to pay more for the property and to waive the seller's commission constituted protected activity, the same cannot be said of his argument that the offer to indemnify the Peterson/Hibners' was protected activity, given the context in which the discussion of indemnity arose. The discussion of the indemnity arguably arose because litigation with Guinnane was probable, and the indemnity agreement was entered into after Guinnane had actually filed the specific performance action. While the record reflects that the offer of indemnity was one of several inducements Chess communicated to the Peterson/Hibners to enter the agreement with Jin, and the trial court held (and we agree) that an indemnity agreement in this context was part of a business negotiation rather than any exercise of the right to petition or free

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Permit Consultants, Inc. (2000) 86 Cal.App.4th 280, 285 (submitting fraudulent insurance claims); *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecomm. Engineers* (1996) 49 Cal.App.4th 1591, 1601-1602 (performance of contractual obligation to county to evaluate competing proposals for public communication system), disapproved on other grounds in *Briggs, supra,* 19 Cal.4th at p. 1123, fn. 10 and *Navellier, supra,* 29 Cal.4th at pp. 91-92.

speech, neither party cited any case law and our own research has yielded none addressing whether and in what circumstances indemnification could constitute protected activity. Thus, it is at least arguable that there was some merit in Chess's claim, at least regarding the offer to indemnify.

Second, Guinnane argues that even assuming for the sake of argument that the offer to indemnify and the subsequent indemnity agreement constituted protected activity, Chess's prong two argument in the trial court that he had demonstrated a likelihood of success on the merits was itself without merit. Noting that the litigation privilege is the primary basis for Chess's prong two argument, Guinnane argues the privilege does not apply because the offer of indemnity and the indemnity agreement "constitute[d] a non-communicative course of conduct that is not covered by the litigation privilege." Guinnane cites a footnote in *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1132, fn. 12 (*PG&E*) for that proposition and also cites that court's further statement that, "while it could be argued that an exhortation to sue might be privileged, financing and otherwise promoting litigation would not be."

The quoted portion of the *PG&E* footnote pertained to the court's discussion of "whether actual interference is adequately alleged when the interference consists of inducing litigation on the contract." (See *PG&E*, *supra*, 50 Cal.3d at pp. 1126, 1129-1138.) The court concluded that a cause of action for interference can be stated in that circumstance, but only if the plaintiff alleges the litigation was brought without probable cause and was concluded in the plaintiff's favor. (*Id.* at p. 1137.) In the discussion leading to that conclusion, the court emphasized the importance of ensuring free access to the courts as demonstrated by the extension of the litigation

privilege to actions for, among other things, interference with business. (*Id.* at p. 1132.)

In the footnote, the court stated that the litigation privilege did not bar liability in the case before it "because the gravamen of the complaint was not a communication but a course of conduct." (*PG&E*, *supra*, 50 Cal.3d at p. 1132, fn. 12.) It was in that context that the court stated, "an exhortation to sue might be privileged," but "financing and otherwise promoting the litigation would not be." (*Ibid.*) The acts PG&E complained of in that case were those of Bear Stearns, which had convinced an agency that was a party to a contract to sell hydroelectric power to PG&E, to study the feasibility of terminating that contract and selling the power to other buyers for a higher price. (*Id.* at p. 1124.) Among other things, Bear Stearns spent years encouraging the agency to try to terminate the contract, and entered into a contingent fee agreement under which it agreed to pay for legal, engineering and marketing studies on the feasibility of terminating the contract in return for a share of any resulting increase in the agency's revenues above a certain threshold. (*Ibid.*) It also drew up a plan by which the agency could retire its bonds and litigate the issue of whether it could terminate the contract. And it conducted a marketing campaign to solicit buyers for the agency's power and agreed to pay half the fees of the agency's counsel. (*Ibid.*)

Here, the offer of indemnity was also made as part of a course of conduct, one that included offering to pay a higher price and to waive the seller's commission for the Property. The plain purpose of all three was to encourage or induce the Peterson/Hibners to sell the Property to Jin rather than proceeding with the sale to Guinnane. The question is not whether funding litigation is communicative speech or noncommunicative conduct, but rather, into which of those categories Chess and Jin's *offer to indemnify* falls.

Further, even if the offer constitutes communicative speech, there remains the question, for purposes of determining whether the litigation privilege applies, whether the offer was "made in the course of a judicial proceeding" and "to achieve the objects of the litigation." (See *Kimmel v. Goland* (1990) 51 Cal.3d 202, 209, quoting *Silberg v. Anderson* (1990) 50 Cal.3d 205, 209 [litigation privilege extends to communications "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [have] some connection or logical relation to the action"].)

In short, Guinnane has made a strong argument that the litigation privilege does not bar its claims, though much of that argument is contained in its cross-appellant's reply brief. While we might find that argument persuasive if we reached it, Guinnane's argument does not convince us that the trial court abused its discretion in concluding Chess's contrary argument was not frivolous. Because we are not prepared to say that the argument was frivolous, it follows that Guinnane has not shown that " ' "any reasonable attorney would agree that [Chess's anti-SLAPP] motion is totally devoid of merit." ' " Therefore, we reject its cross-appeal.

DISPOSITION

The judgment and the order denying attorney fees are affirmed. Respondent shall recover its costs on appeal. Cross-respondent shall recover its costs on the cross-appeal.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.